IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 686 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JAYANTIBHAI PURSHOTAMBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:
Mr.K.B.Anandjiwala, advocate for the appellant.
Mr.M.A.Bukhari, A.P.P.for the Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 03/12/96

ORAL JUDGEMENT: (Panchal,J.):-

By means of filing this appeal under section 374(2) of the Code of Criminal Procedure,1973, the appellant has questioned legality and validity of judgment and order dated June 18,1988 rendered by the

learned Additional Sessions Judge, Nadiad, in Sessions Case no.2/88 by which the appellant is convicted under sections 302 and 324 of the Indian Penal Code and sentenced to R.I. for life and pay a fine of Rs.500/i/d. R.I. for 3 months for the offence under section 302 I.P.C. and R.I. for one year and a fine of Rs.500/i/d. R.I. for 3 months for the offence punishable under section 324 I.P.C. It may be mentioned that the substantive sentences are ordered to run concurrently.

2. Original complainant Madhuben is a resident of village Telnar and at the relevant time, was residing with her deceased husband Khana Deva. Two months prior to the date of incident, which took place on September 6,1987, the appellant was alleged to have committed rape on Madhuben, who is original informant and wife of deceased Khana Deva. It was the case of Madhuben that threats to kill her were administered by the appellant and, therefore, she had not filed any complaint regarding rape on her by the appellant, but had confided the incident to her deceased husband. Madhuben and her husband entertained reasonable apprehension that hurt would be caused to them by the appellant. Therefore, both of them left village Telnar and went to village Betwada. At village Betwada, both of them resided for about 1 1/2 months and thereafter returned to village Telnar. After about fortnight of their return, the incident took place. On the date of incident, complainant Madhuben was going to field for the purpose of doing agricultural work, whereas her husband deceased Khana had already left for doing agricultural work in the field of one Kantibhai Khodabhai. When Madhuben was passing through bazar of village Telnar, she was followed by the appellant and when Madhuben reached the sim of the village, the appellant threatened her as he was of the view that he was defamed by her. Thereupon Madhuben retorted that she had not defamed the appellant, but the appellant, in fact, had spoilt her reputation. Meanwhile, when deceased Khana was returning home from the field, the appellant also told him that he had spoilt his reputation whereupon the deceased denied said allegation of the appellant. It is the case of the prosecution that thereafter the appellant went to the house of his brother and when complainant Madhuben and her husband were passing by the shop of one Krishnabhai, they were assaulted by the appellant by means of dharia. The appellant first of all assaulted deceased Khanabhai and inflicted dharia blow on his chest. On seeing assault on her husband, the complainant got frightened and started running towards her house, but the appellant inflicted dharia blow on her also. Deceased khana went

to Primary Health Centre, Telnar in injured condition, but fell down near the gate of Primary Health Centre. Dr. Ketan M.Patel, who was on duty, at Primary Health Centre, examined deceased Khana and found him dead. Under the circumstances, he conveyed necessary information on telephone to Navalsinh Mangalsinh, who was officer incharge of Kapadwanj Rural Police Station. Navalsinh Mangalsinh informed the medical officer that he would reach Primary Health Centre within 15 minutes. Meanwhile, the medical officer received information that a lady was lying in an injured condition and was unconscious. The medical officer, therefore, went to the place where the lady was lying and examined her. Thereafter the medical officer returned to the Primary Health Centre and by that time, police had arrived at the Primary Health Centre. On necessary information being conveyed by the medical officer to the police officers,the police officers went to the place where Madhuben was lying on road in an injured condition. Her complaint was recorded at that very place and thereafter she was referred to Hospital for treatment of injury sustained by her. In due course, the investigation was taken over by P.S.I. Mr. S.A.Desai. The investigating officer prepared necessary panchnamas and recorded statements of witnesses who were found conversant with the incident. The investigating officer also held inquest on the dead body of deceased Khanabhai and sent the dead body for postmortem examination to J.D.Mehta General Hospital, Kapadwanj where autopsy on the dead body was performed by Dr. Prakashchandra Shantilal Chhajad. On September 6,1987, a yadi was addressed to Mr. R.M.Soni, who was then discharging duties as Mamlatdar and he was requested to record dying declaration of injured Madhuben. Accordingly, dying declaration of Madhuben was recorded by the Mamlatdar. On completion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate, First Class,Kapadwanj under sections 302 and 307 of I.P.C. As the offences are exclusively triable by Sessions Court, the case was committed to Sessions Court for trial and it was registered as Sessions Case no.2/88 in the Court of learned Additional Sessions Judge, Nadiad.

3. The learned Additional Sessions Judge framed charge at exh.7 against the appellant under sections 302 and 307 of the Indian Penal Code. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Prakashchandra Shantilal Chhajad, PW.1, exh.9, (2) Dr. Harshadrai

Chandulal Goradiya, PW.2, exh.19, (3) Krishnabhai Ranchhodbhai, PW.3, exh.26, (4) Hargovindbhai Ramabhai, PW.4, exh.27, (5) Kalidas Ranchhodbhai Patel, PW.5, exh.28, (6) Madhuben, widow of Khanabhai Devabhai, PW.6, exh.29, (7) Ramjibhai Govindbhai Makwana, PW.7, exh.31, (8) Galabhai Morarbhai, PW.8, exh.32, (9) Khatubhai Danabhai, PW.9,exh.33, (10) Dr.Ketankumar Mohanlal Patel, PW.10,exh.34, (11) Kodarbhai Lalabhai Vanker, PW.11,exh.35, (12) Dr.Sudhakar Girish Pandya, PW.13,exh.41, (13) Natverlal Chhanalal, PW.14, exh.42, (14) Laghubha Udesing,PW.15, exh.44, (15) Navalsinh Mangalsinh, PW.16, exh.47, (16) P.S.I. Mr. S.A.Desai, PW.17, exh.49, and (17) Samabhai Shankerbhai, PW.18, exh.52, to prove its case against the appellant. The prosecution needed further examination of Dr,Prakashchandra Shantilal Chhajad regarding injury sustained by complainant Madhuben and, therefore, submitted application exh.23 requesting Court to recall him. The learned defence Counsel did not raise any objection and, therefore, Dr. Chhajad was recalled and re-examined as PW.12 at exh.40. The prosecution further needed to examine Dr. Prakash Chhajad regarding injuries sustained by the accused and, therefore, requested the Court to recall and re-examine him by submitting application exh.55. On this application also, no objection was raised by the defence. Under the circumstances, Dr. Prakash Chhajad was again re-called and re-examined as prosecution witness no.19 at exh.57. As Dr.Chhajad was re-examined twice by the prosecution, the defence wanted to put certain questions to the investigating officer. The defence, therefore, submitted an application at exh.61 and requested the Court to recall investigating officer and re-examine him again. The said application was not objected to by the prosecution and, therefore, investigating officer Mr. S.A.Desai was recalled and re-examined as prosecution witness no.20 at exh.62.

4. The prosecution also relied on documentary evidence such as postmortem notes exh.10, certificate of injury sustained by complainant Madhuben exh.20, First Information Report given by injured Madhuben exh.50, different panchnamas prepared during the course of investigation, report received from Forensic Science Laboratory, certificate of injury sustained by the appellant etc. to prove its case against the appellant.

5. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the appellant generally on the case and recorded his statement under section 313 of the Code of Criminal

Procedure,1973. In his further statement recorded under section 313, the appellant claimed that while he was going to field with a dharia, filthy abuses were given to him by Madhuben and when he requested Madhuben not to abuse him, sickle was hurled at him and Madhuben had tried to squeeze his testicles. It was also claimed by the appellant that when he asked Madhuben to spare him, Madhuben continued her attempt to squeeze his testicles and, therefore, in order to save his life,he caused injury to Madhuben with dharia. It is asserted by the appellant in his statement that thereupon the deceased arrived on the scene and tried to inflict blows with dharia, but as he moved on side, the blow landed on his hand and when the deceased aimed another blow, he tried to disarm the deceased and in that process, deceased sustained injury. In order to falsify the version of complainant Madhuben that she had witnessed assault by the appellant on her deceased husband, the appellant examined Radhekrishna Maneklal Soni, who was at the relevant time discharging duties as Mamlatdar and who had recorded dying declaration of complainant Madhuben. Though Mamlatdar Mr. Soni was examined by defence, the learned Judge has proceeded on the footing that he was examined by the prosecution as prosecution witness number 21 at exh.64. The Executive Magistrate produced at exh.66 dying declaration recorded by him and made by injured Madhuben.

6. After taking into consideration the evidence led by the parties, learned Judge concluded that deceased Khana Deva died a homicidle death. The learned Judge held that the prosecution has proved beyond reasonable doubt that the appellant inflicted dharia blow on deceased Khana Deva with intention to cause his death and committed an offence punishable under section 302 I.P.C. The learned Judge also concluded that prosecution has proved it beyond reasonable doubt that the appellant voluntarily caused hurt to Madhuben by dharia, which is a dangerous weapon. The learned Judge negatived the case pleaded by the appellant that he had inflicted injuries to the deceased and Madhuben in his self-defence. In view of these conclusions, the learned Judge by the impugned judgment convicted the appellant under sections 302 & 324 of I.P.C. and imposed sentences which are referred to earlier,giving rise to the present appeal.

7. Mr. K.B.Anandjiwala, learned Counsel for the appellant has taken us through the entire evidence on record. It is pleaded that testimony of injured Madhuben is not only contradicted in material particulars, but is untrustworthy and, therefore, conviction of the appellant

under section 302 I.P.C. deserves to be set aside. It is contended that if the evidence of injured Madhuben is ignored from consideration, there is no reliable evidence on the record to prove the case of prosecution under section 302 I.P.C. against the appellant and, therefore, appeal should be allowed. In the alternative, what is emphasised on behalf of the appellant is that the evidence of Krishnabhai Ranchhodbhai, PW.3 exh.26 read with certificate of injury sustained by the appellant, clearly establishes that the appellant had caused injuries to the deceased in self-defence and, therefore, conviction of the appellant should be converted into one under section 304 Part-I of I.P.C. from section 302 I.P.C.

8. Mr. M.A.Bukhari, learned A.P.P. has submitted that cogent and convincing reasons have been assigned by the learned Judge while convicting the appellant under section 302 I.P.C. and in absence of good grounds, finding of facts recorded by the Court of first instance should not be interfered with by the Court. It is claimed that injured wife would not allow the real culprit to go scot free and involve the appellant falsely with reference to murder of her husband and, therefore, in view of her testimony, conviction of the appellant under section 302 I.P.C. should be sustained. It is emphasised by the learned Counsel for the respondent that the appellant having failed to make good plea of self-defence, conviction of the appellant under section 302 I.P.C. should not be converted into one under section 304 Part-I of I.P.C. and the appeal should be dismissed.

9. The finding that deceased Khana Deva died a homicidle death, is not challenged by the learned Counsel for the appellant before us. The evidence of Dr. Prakash Shantilal Chhajad, PW.1, exh.9 shows that he had performed autopsy on dead body of Khana Deva on September 7,1987 and had noticed injuries which are enumerated in detail by him in his testimony. The Medical Officer has stated in his deposition that he had prepared postmortem notes which are produced at exh.10. In the postmortem notes also, injuries sustained by the deceased are mentioned in detail. The cause of death mentioned by the medical officer in postmortem notes is as under: "Cause of death can be given as shock following haemorrhage from major blood vessels underneath clavical injury to lung and sub-costal vessels". Having regard to the evidence led by the prosecution and more particularly the medical evidence, there is no manner of doubt that deceased Khana Deva died a homicidle death. The finding that deceased

Khana Deva died homicidle death is eminently just and is hereby upheld.

10. So far as injury caused by the appellant to deceased Khana Deva is concerned, the prosecution has mainly relied on the evidence of (1) Krishna Ranchhodbhai PW.3, exh.26, (2) Madhuben,widow of deceased Khana Deva,PW.6, exh.29, and (3) Kodar Lalabhai Vanker, PW.11, exh.35. We would first of all discuss the evidence of injured Madhuben. She is widow of deceased Khana Deva. In her testimony, she has stated that after 15 days of return to village Telnar when she was going to village for doing agricultural work, the appellant who was standing in chowk,had followed her and in the sim of village, an altercation had taken place between her and the appellant. She has deposed that her husband who was returning home after doing agricultural work, had also an altercation with the appellant and when she and her deceased husband were passing by the shop of Krishnabhai, the appellant had assaulted her husband by means of dharia and had also caused injury to her. In cross-examination, she has admitted that her deceased husband was armed with dharia at the time when the incident took place. In the cross-examination she has asserted that her dying declaration was not recorded at all by the Mamlatdar of Kapadwanj when she was treated at J.D.Mehta General Hospital, Kapadwanj for her injury. During her further cross-examination she has admitted that she had stated in her statement before the mamlatdar that because of apprehension from the appellant, she had not narrated the incident of rape on her by the appellant to anyone. Again, in another breath, she has asserted that her statement was never recorded by Mamlatdar. She has also admitted in her testimony that she had a sickle and a can in her arms when the incident took place. She has denied the suggestion made by the defence that she had tried to squeeze testicles of the appellant. However, she has stated that because of dharia blow given by the appellant, the dharia which was in the hand of her husband, had fallen on the ground. In the examination-in-chief, it was claimed by her that after altercation which had taken place in the sim of village,she in the company of her husband was returning home and the appellant had gone towards the house of his brother, but in cross-examination, she has stated that when she and her husband were returning home, the appellant was standing near his house duly armed with dharia. As observed earlier, the defence has examined Mr. R.M.Soni, Mamlatdar, Kapadwanj, who had recorded dying declaration of injured Madhuben. It is well settled that when a person who had made statement may be

in expectation of death, is not dead, it is not a dying declaration and is not admissible under section 32 of the Evidence Act. Where the maker of statement is not only alive, but has deposed in the case, statement is not admissible under section 32; his statement, however,is admissible under section 157 of the Evidence Act as a former statement made by him in order to corroborate or contradict his testimony in Court. Therefore, dying declaration recorded by Executive Magistrate Mr. Soni and produced at exh.66, can be received in evidence only for limited purpose of finding out whether Madhuben is corroborated in her version before Court. Mr. R.M.Soni, Mamlatdar in his evidence has clearly stated that on receipt of yadi he had gone to J.D.Mehta General Hospital, Kapadwanj and after verifying the fact that injured Madhuben was in a fit condition to make statement, he had recorded her statement as narrated by her. He has produced the statement recorded by him at exh.66. In exh.66, injured Madhuben stated that altercation had taken place in a field and thereafter all the three i.e. she herself, her husband and the appellant had returned to the village whereupon the appellant had gone to house of his brother and she in company of her husband had proceeded towards their house. She has in no uncertain terms stated that on hue and cry being raised by village boys,she had noticed that the appellant was chasing her and her husband with dharia and, therefore, she had made her escape good and taken shelter in the house of one Manguben Vaniya where the appellant had caused injury by means of dharia to her. Thus, her previous statement recorded by Mamlatdar does not corroborate her say that she had witnessed the actual assault being mounted by the appellant with dharia on her deceased husband. As observed earlier, she has denied the obvious things. Though her statement in the form of dying declaration was recorded by the Mamlatdar, she asserted before the Court that her statement was never recorded at Kapadwanj Hospital. This indicates tendency on her part to suppress truth. On totality of the evidence of injured Madhuben, we are inclined to hold that she had not witnessed assault by the appellant on her husband and her evidence is of no help to the prosecution to prove charge against the appellant under section 302 I.P.C. for intentionally causing death of deceased Khana. This leaves the Court with evidence of Krishna Ranchhodbhai, PW.3, exh.26 and Kodarbhai Lalabhai Vanker,PW.11, exh.35. Kodarbhai Lalabhai Vanker has stated in his testimony before the Court that on the date of the incident he had been to village chora for meeting Talati, but as Talati was not available, he had gone to Hospital and when he reached near a society situated by

the side of Hospital, he heard the shouts of the deceased and the deceased declared before him that the appellant had caused injuries to him by means of dharia. Though this witness is cross-examined at length, nothing has been elicited so as to discredit his testimony. He is neither related to the deceased nor to the complainant. It is not brought on record of the case that he had any enmity with the appellant. Having regard to the circumstances of the case, we are inclined to believe the oral dying declaration made by the deceased before Kodarbhai Lalabhai Vanker, which proves that the appellant was the person who caused injuries to deceased by means of dharia. However, his evidence does not throw any light as to how the incident had taken place. It is relevant to note that in his further statement recorded under section 313 of the Code of Criminal Procedure,1973 the appellant claimed that while he was going to field with dharia, filthy abuses were given to him by Madhuben and when he requested Madhuben not to abuse him, sickle was hurled at him and Madhuben had tried to squeeze his testicles. It is also claimed by him in his further statement that when he asked Madhuben to spare him, Madhuben continued her attempt to squeeze his testicles and, therefore, in order to save his life, he had caused injury to Madhuben with dharia. It is asserted by the appellant in his statement that thereupon the deceased arrived on the scene and tried to inflict blows with dharia, but as he moved on side, blow landed on his hand and when the deceased aimed another blow, he tried to disarm the deceased and in that process the deceased sustained injury. The question which falls for the consideration of the Court is whether the appellant has probablised his defence or not ? In order to decide this question, it would be essential to refer to the evidence of PW.3,exh.26. This witness has a hair cutting Salon, which is situated in Sardar Chowk of village Telnar. On the date of incident, he had opened his shop and was working therein. He noticed that the appellant on one hand and injured Madhuben on the other were quarreling near the temple situated by the side of his shop. On hearing the quarrel, he came out of the shop and heard the appellant saying Madhuben that he would kill her. The witness has stated that thereupon Madhuben retorted and hurled sickle at the appellant. The witness has stated that when Madhuben tried to squeeze testicles of the appellant, the appellant inflicted dharia blow on her. The witness has claimed that meanwhile deceased Khana came on the spot and picked-up quarrel with the appellant saying that why the appellant had beaten his wife. The witness has clearly stated that deceased Khana Deva and the appellant were armed with dharia and the

first blow was aimed by the deceased at the appellant. The witness has stated that dharia which was in the hands of the deceased, fell down and when the deceased tried to pick-up the same, the appellant inflicted one blow with dharia to the deceased. With permission of the Court, the witness was declared to be hostile to prosecution. However, his version viz. Madhuben had hurled sickle at the appellant or had tried to squeeze testicles of the appellant or that the deceased had aimed first blow at the appellant etc.,is not controverted at all. It is relevant to note that the appellant had also sustained injury on his thumb. This is established by injury certificate produced by Dr. Prakash Chhajad at exh.59. Having regard to the facts and circumstances of the case, we are of the opinion that the prosecution has suppressed genesis of the incident and the appellant has probablised his defence that he had caused injuries to the deceased while exercising right of private defence.

11. The next question which requires to be considered is whether the appellant had exceeded the right of private defence by causing death of the deceased. Even if the evidence of Krishna Ranchhodbhai, PW.3, exh.26 is fully accepted, it does not indicate that the act of the deceased had reasonably caused apprehension of death or of grievous hurt in the mind of the appellant. The evidence of Krishnabhai shows that the appellant had inflicted blow to the deceased when deceased was attempting to pick-up dharia, which was lying on the ground. As per the postmortem notes, the medical officer had noted following external injuries on the dead body of the deceased while performing autopsy :-

(1) oblique incised wound on right side chest starting from above, the right middle of clavical to 1 c.m. lateral toright nipple breast. 15 cm x 7 cm x lung deep clavical & ribs seen cut. Blood clots seen in the wound. On removing clots major blood vessels are also cut.
(2) C.L.W. on Rt.chest 5 cm below & 4 cm lateral to right neeple. 3/4 cm x 1/4 cm bone deep.
(3) L.W. on Rt. forearm middle part 5 cm x 2 cm x muscle deep.
Cut Rt clavical and 2nd, 3rd,4th, 5th & 6th ribs.

The nature of the injuries sustained by the deceased makes it abundantly clear that dharia blow was given with great force, as a result of which haemorrhage from major blood vessels had taken place. Having regard to the facts of the case, we are of the opinion that the

appellant had exceeded the right of private defence and had caused death of the deceased with intention of causing such bodily injury as was likely to cause death, which would bring his case under section 304 Part-I of I.P.C. and not under section 302 of I.P.C. For all these reasons, the conviction of the appellant under section 302 and sentences imposed on him are liable to be set aside and the appellant is liable to be convicted under section 304 Part-I of the Indian Penal Code.

12. So far as the conviction of the appellant under section 324 of I.P.C. is concerned, we are of the opinion that the same is well-founded and does not deserve any interference by the Court in the present appeal. Injured Madhuben in her sworn testimony has clearly stated that the appellant had caused hurt to her by means of dharia. She is not only corroborated by her First Information Report, but also by medical evidence on record. On the facts and in the circumstances of the case, it cannot be said that any error is committed by the learned Judge in convicting the appellant under section 324 of I.P.C. The conviction of the appellant under section 324 I.P.C. and sentences imposed therefor, will have to be upheld.

13. For the foregoing reasons, conviction of the appellant under section 302 I.P.C. as well as sentences imposed on the appellant, therefor, are hereby set aside and quashed. Instead the appellant is convicted under section 304 Part-I of the Indian Penal Code. We have heard the learned Counsel appearing for the parties on the question of sentence. We are informed by the learned Counsel for the appellant that the appellant is in jail since his arrest which was effected on September 6,1987.The fact that the appellant is in jail since his arrest is not disputed on behalf of the respondent. Thus, the appellant is in jail for a period of more than 9 years. That in our view would be sufficient punishment to him. On the facts and in the circumstances of the case, we are of the opinion that interest of justice would be served if the appellant is sentenced to the period of imprisonment already undergone by him. We accordingly, sentence him to imprisonment for the period already undergone by him. As the appellant has undergone the sentence imposed on him for the offence punishable under section 304 Part-I of the Indian Penal Code, the jail authorities are directed to set him at liberty forthwith unless required in any other case. The appeal accordingly stands partly allowed in terms of the above order. The order passed by the learned Judge regarding disposal of the muddamal is hereby confirmed.

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